

D.P.U. 91-DS-32

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Fed. Corp.

APPEARANCES: Alessandro Morteo
 Fed. Corp.
 1039 East Street
 Dedham, Massachusetts 02026

 FOR: FED. CORP.
 Respondent

Henry Cappuccio, Public Utility Engineer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202

 FOR: THE DIVISION OF PIPELINE
 ENGINEERING AND SAFETY

I. INTRODUCTION

On July 16, 1991, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fed. Corp. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on April 23, 1991, at 11 Fremont Street, and May 29, 1991 at 30 Union Street, in Plymouth, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions at both locations, and maintain markings at 30 Union Street, causing damage to an underground service line and a main line operated by Commonwealth Gas Company ("Commonwealth Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on August 13, 1991, or send a written reply to the Department by that date.

On August 12, 1991, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent stated that it was not aware of an incident involving the Respondent on Fremont Street. The Respondent also stated that the damage at 30 Union Street was due to inaccurate markings, and that the Respondent had used reasonable precautions during excavation at that location. In a letter dated September 10, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On September 20, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on June 9, 1992.

Henry Cappuccio, a public utility engineer for the Division, represented the Division. Paul Pouliot, superintendent of technical services, testified in behalf of the Division. Alessandro Morteo testified for the Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division's Position

The first underground damage report offered by the Division indicates that on April 23, 1991, the Respondent damaged a Company service line at 11 Fremont Street in Plymouth and did not exercise reasonable precautions (Exh. D-1). The second underground damage report offered by the Division indicates that on May 29, 1991, the Respondent damaged a Company main line at 30 Union Street in Plymouth without maintaining the Company's markings or requesting a re-marking (Exh. D-2). The second report also indicates that the Company's markings were not within 18 inches of the damaged facility (id.). In addition, in this report the Division alleged that the Respondent had failed to maintain the Company's markings, or call for a re-marking when the original markings were lost while excavating at 30 Union Street (Tr. at 6, 56).

The Division contended that the Respondent had accidentally caused damage at 11 Fremont Street while it was removing a water main (id. at 9; Exh. D-1). The Division also contended that the damage at 30 Union Street occurred to a main line while the Respondent was removing a catch-basin [man-hole] (Tr. at 14; Exh. D-2). The Division further contended that at both locations, the Company's markings were proper and were in place when damage occurred

(Tr. at 7, 56). In addition, the Division asserted that the damage occurred at both locations because the Respondent ignored the Company's markings before excavating (id. at 7).

The Division contended that the Company marked 30 Union Street on February 22, 1991, and from that point forward, worked closely with the Respondent to avoid unnecessary damage (id. at 10-11, 25-26; Exh. D-8).¹ Mr. Cappuccio alleged that the Respondent should have used hand-digging and other precautions to expose underground facilities and prevent damage (Tr. at 51, 56). Mr. Cappuccio also alleged that if hand-digging was not possible, the Respondent should have informed the Company that damage was possible, and the Company would have bypassed the section of gas pipe that might be damaged (id. at 51-52). Mr. Pouliot contended that the use of reasonable precautions would have prevented the damage to the main line (id. at 28). Mr. Pouliot also contended that if the Respondent knew that the main was located within the wall of the manhole, it should have removed the manhole, one brick at a time, until the main was exposed (id. at 52).

B. The Respondent's Position

Mr. Morteo asserted that neither the Respondent nor the city engineer who was at the site continuously had any record of damage occurring at 11 Fremont Street on April 23, 1991 (id. at 32-33). Mr. Morteo also testified that the Respondent had obtained a valid Dig-Safe number

¹ Neither Mr. Cappuccio nor Mr. Pouliot stated or inferred that they had visited 30 Union Street during the period surrounding the damage caused by the Respondent. In fact, on several occasions during the hearing, Mr. Pouliot stated that he was informed about case through discussions with Company employees who had visited the site (Tr. at 17-18, 27, 39, 53). Therefore, most of Mr. Pouliot's and Mr. Cappuccio's testimony is strictly hearsay and can only be used in the Department's decision as support for related evidence.

for 30 Union Street, and did not violate the Dig-Safe Law in any way at that location (id. at 41).

Mr. Morteo further testified that after the Respondent gave proper notice, it worked continuously at the site of 30 Union Street until the date of the damage on May 29, 1991 (id. at 41).

Mr. Morteo stated that the Respondent was removing an abandoned manhole at 30 Union Street when it caused damage to a Company main (id. at 34). He also stated that the Respondent used the Company's markings when it was planning the excavation and removal of the manhole (id. at 46). Mr. Morteo further stated that although the markings and a company map showed the main to be located outside the walls of the manhole, it was actually located within the walls of the manhole (id. at 34-35, 40, 50, 60). Therefore, he maintained that when the manhole was removed by the Respondent, the main was pulled and broken (id. at 35).

Mr. Morteo stated that shortly before causing damage at 30 Union Street, the Respondent had damaged a facility at a location approximately 800 feet from 30 Union Street (id. at 35-36, 43). He also stated that the Respondent had called the Company immediately after the damage at the first site, at that the Company repair crew had been prompt in arriving to fix the damage (id. at 43). Mr. Morteo further stated that when damage occurred at 30 Union Street, the Respondent promptly contacted the aforementioned Company repair crew, and the crew came to 30 Union Street and repaired the leak at 30 Union Street (id. at 43-44). Mr. Morteo testified that he had witnessed the damage by the Respondent and repair by the Company at 30 Union Street, in Plymouth (id. at 40, 43, 59-60). In addition, Mr. Morteo maintained that because the underground facilities in the area were old and defective, those facilities were replaced shortly

after the excavation was completed (id. at 40, 59).²

Mr. Morteo contended that the markings at the site on 30 Union Street were maintained during the excavation by the Respondent and the Company's designated marking person, who was on-site every day (id. at 45). Mr. Morteo also contended that the markings had been accurate and the main had been within 18 inches of the actual location of the facility, that the Respondent would not have broken the facility (id. at 47).

Mr. Morteo contended that it was not possible to remove the main from within the wall of the manhole without causing damage (id. at 48). Mr. Morteo also contended that the Respondent took all reasonable precautions possible to prevent damage to underground facilities at 30 Union Street (id. at 41). Mr. Morteo testified that the Respondent took reasonable precautions by removing the frame and cover of the manhole before dismantling the manhole (id. at 47-48). He also testified that the Respondent took further precautions by slowly dismantling the manhole "a little bit at a time," rather than all at once (id. at 48). In addition, Mr. Morteo testified that the Respondent used a small back-hoe to remove the manhole, rather than a large one (id. at 48). Finally, Mr. Morteo testified that the main was not visible before the manhole was removed, and that the main could not have been exposed by hand before excavation because the main was "mortared" and cemented into the brick wall of the manhole (id. at 47, 49-50).

² The Company testified that the mains were installed in 1914 (Tr. at 22).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, *supra*; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the

Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, supra, at 9; Fed. Corp., supra, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, supra; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

G.L. c. 82, § 40 also states:

After a company has designated the location of such pipes, mains wires and conduits at the locus of the excavation in accordance with the provisions of this section, the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking at the locus due to obliteration, destruction or other removal of such markings and the company shall then have twenty-four hours following the receipt of such request to re-mark such locus.

The Department has consistently found that excavators are responsible for maintaining utility designation markings. Linden Construction Company, D.P.U. 87-DS-149 (1991). That responsibility attaches after utility companies have marked the location of their underground facilities at the excavation site named in the Dig-Safe request. Warner Bros., Inc., D.P.U. 87-DS-124 (1990). The Dig-Safe Law states that excavators must call for a re-marking if markings are no longer visible or have been inadvertently moved. Lachance Excavating Company, Inc., D.P.U. 87-DS-178 (1990). Even in circumstances where no damage occurs, the failure of an excavator to maintain markings is considered a violation of the Dig-Safe Law. Warner Bros. Inc., supra.

III. ANALYSIS AND FINDINGS

The issues to be decided in this case are whether the excavator (1) failed to maintain Company markings during excavation, and (2) failed to exercise reasonable precautions to protect underground facilities while excavating.

Before addressing the issues mentioned above, the Department must determine whether the Division adequately demonstrated that the Respondent caused the damage at 11 Fremont Street. Although the Division contended that the Respondent caused damage at 11 Fremont Street, it failed to present evidence sufficient to demonstrate that the Respondent caused the damage at that location. The Respondent testified that it had no knowledge of any incident involving the Respondent and Commonwealth Gas at 11 Fremont Street, consistent with its August 12, 1991 letter. In fact, with the exception of the underground damage report, no evidence was given that indicated that the Respondent was even excavating in the vicinity of 11 Fremont Street. Accordingly, the Department finds that the Division has not demonstrated that the Respondent caused damage at 11 Fremont Street. Therefore, all allegations made by the Division in reference to possible violations by the Respondent at 11 Fremont Street will not be addressed by the Department in this Order.

In addressing the first issue, the Division's allegation that the Respondent failed to adequately maintain Company markings was supported only by a corresponding check-mark in the relevant box of the Company's underground damage report. The Division failed to present a witness who had visited the site to support its allegation. Furthermore, the Respondent controverted the Division's contention when its witness stated that not only had Respondent's

employees maintained markings at the site of 30 Union Street, but that the Company's official mark-out person had worked continuously with the Respondent to maintain markings and avoid damage. In addition, the Respondent's witness testified that he was present at the site during the relevant damage and subsequent repair by the Company. Accordingly, based on the record, the Department finds that the Respondent maintained Company markings adequately and therefore, did not violate the Dig-Safe Law with respect to this issue.

In addressing the issue of whether the Respondent used reasonable precautions during excavation, the Division contended that the Respondent should have used hand-digging to expose the utility before excavating with a machine. However, the Division had no witness to confirm that hand-digging was possible. The Division alleged that precautions in addition to hand-digging should have also been used by the Respondent, but it failed to provide descriptions of those additional precautions.

The Respondent again controverted the Division's allegations when it testified that hand-digging at the site of 30 Union Street was impossible. In addition, the Respondent testified that it took reasonable precautions by: (1) removing the frame and cover of the manhole before excavating; (2) dismantling the manhole "a little bit at a time" rather than all at once; and (3) using a small back-hoe to dismantle the man-hole rather than a large one.

In specific instances where an allegation of a failure to exercise reasonable precautions has been made without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U.

88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.

In the instant case, the Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when the Respondent failed to hand-dig to locate the underground facilities prior to excavation. The Respondent also provided adequate supporting evidence that it used reasonable precautions, and that evidence was not controverted by the Division. Accordingly, the Department finds that the Respondent did not fail to exercise reasonable precautions when excavating on May 29, 1991 at 30 Union Street, in Plymouth, Massachusetts, and therefore, did not violate the Dig-Safe Law.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Fed. Corp. did not violate the Dig-Safe Law during excavation at 30 Union Street, in Plymouth on May 29, 1991; and it is

ORDERED: That the NOPV against the Respondent be and is hereby Dismissed.

By Order of the Department,